

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

NOV - 1 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Reform of the Interstate
Access Charge Rules

)
)
) RM-8356
)

OPPOSITION OF HYPERION TELECOMMUNICATIONS

Leonard J. Kennedy
Steven F. Morris

Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

November 1, 1993

No. of Copies rec'd
List A B C D E

0+4
C C B

TABLE OF CONTENTS

Page

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| SUMMARY | ii |
| I. INTRODUCTION | 1 |
| II. USTA's SEVEN OBJECTIVES ARE FLAWED AND CANNOT SERVE AS THE BASIS FOR ACCESS CHARGE REFORM | 2 |
| A. Promote Universal Service | 3 |
| B. Promote Introduction of New Services and Technologies | 3 |
| C. Support Balanced Competition in Access Markets | 4 |
| D. Promote Efficient Use of the Network | 5 |
| E. Encourage Continued Development of an Advanced National Infrastructure | 6 |
| F. Prevent Unreasonable Discrimination | 6 |
| G. Minimize Regulatory Burdens | 7 |
| III. USTA's REFORM PROPOSALS PROVIDE LECs WITH EXCESSIVE FLEXIBILITY AND HINDER THE DEVELOPMENT OF ACCESS COMPETITION | 8 |
| A. Access Rate Structure | 8 |
| B. Access Pricing | 10 |
| IV. THE COMMISSION CANNOT ADOPT CHANGES IN ACCESS RATE STRUCTURE AND PRICING WITHOUT DETERMINING THE PROPER LEVEL OF ASSISTANCE FOR PUBLIC POLICY GOALS | 13 |
| V. CONCLUSION | 14 |

SUMMARY

The United States Telephone Association ("USTA") has filed a petition proposing sweeping changes in the Commission's access charge rules. USTA outlines seven public policy objectives and proposes changes in the access rate structure and pricing rules designed to achieve these objectives. Hyperion believes that USTA's "public policy" objectives are self-serving and that its proposed reform measures are intended to hinder competition, rather than encourage it.

In outlining the objectives that should be considered in adopting new access charge rules, USTA relies on the assumption that LECs and their potential competitors are similarly situated and that meaningful access competition already exists. Hyperion submits that the Commission has never properly analyzed the validity of either assumption and that access reform measures based on these assumptions will be misguided.

The rate structure and pricing reform measures proposed by USTA are intended to give local exchange carriers a degree of pricing flexibility that is unwarranted given the existing level of competition. USTA's proposal would give LECs even greater flexibility than they have under the Commission's expanded interconnection decisions; decisions that Hyperion believes are far too lenient in granting pricing flexibility. Adoption of the USTA reform proposals would be inconsistent with the pro-competitive policies that Commission has previously pursued.

Finally, the Commission must conduct a thorough examination of its contribution and assistance policies. The Commission must determine the scope of any existing subsidy flow from access services and whether that subsidy is properly distributed to those in need of assistance. If the Commission determines that CAPs and IXC's should be required to contribute to universal service needs, it should require that such contributions be collected and distributed by a non-LEC third party.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

NOV - 1 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Reform of the Interstate)
Access Charge Rules)

RM-8356

OPPOSITION OF HYPERION TELECOMMUNICATIONS

Hyperion Telecommunications, Inc. ("Hyperion"), by its attorneys and pursuant to Section 1.405 of the Commission's Rules, 47 C.F.R. § 1.405, hereby submits its comments in the above-referenced matter. Because the objectives outlined in the petition filed by the United States Telephone Association ("USTA") are inconsistent with the goal of fostering a competitive market for interstate access services, it would be inappropriate to adopt the proposed measures identified in this petition.

I. INTRODUCTION

The USTA petition (the "Petition") proposes sweeping changes to the rules governing interstate access charges. 47 C.F.R. Parts 43, 61, 64, 65 and 69. The Petition outlines seven public policy objectives and proposes significant changes in access rate structure and pricing designed to achieve these objectives. USTA argues that these changes are necessary due to the rapid technological change and increasing competition that have characterized the market since the rules were adopted in 1983.

Hyperion is a competitive access provider ("CAP"). Hyperion provides access services that compete with certain services offered by the local exchange carriers ("LECs") that USTA represents. Accordingly, Hyperion has a significant interest in any action the Commission takes in response to the USTA petition.

Hyperion believes that adoption of the specific reform proposals included in the Petition would be misguided. The public policy objectives advocated by USTA are self-serving and based on assumptions that cannot be supported. The proposed reforms are designed to provide LECs the flexibility to destroy competitors before they are established in the market. Before the Commission amends its access charge rules, it must have a thorough understanding of the structure and operation of competition in the interstate access market; only then will it be able to adopt rules that serve the public interest.

II. USTA's SEVEN OBJECTIVES ARE FLAWED AND CANNOT SERVE AS THE BASIS FOR ACCESS CHARGE REFORM

USTA outlines seven "public policy" goals that it suggests the Commission should seek to achieve in this proceeding. The objectives outlined by USTA are self-serving and based on unsubstantiated assertions regarding the operation of the interstate access market. Hyperion believes that the Commission must identify public, not private, interest objectives before it considers any access reform proposal.

A. Promote Universal Service

USTA states that any reform proposal adopted by the Commission should promote universal service. Petition at 14. Hyperion and other CAPs have consistently supported the concept of universal service. However, before LEC competitors are forced to pay contribution charges, the Commission is obligated to determine the scope of actual subsidy flows, if any. The Commission must also adopt appropriate standards for determining who should receive assistance and how much they should receive.^{1/}

B. Promote Introduction of New Services and Technologies

Although any policy adopted by the Commission should promote innovative services and technologies, the best way to achieve this goal is through policies that create a competitive market for interstate access services. The rule changes proposed by USTA will result in significantly reduced oversight of new LEC offerings by the Commission and are inconsistent with the Commission's pro-competitive policies.

Reduced regulatory oversight is not justified for dominant carriers facing incipient competition. While reduced oversight may allow new services to reach the market sooner, it also gives LECs the ability to foreclose long-term competition at the expense of ratepayers. The Commission must carefully weigh

^{1/} See Section IV for a discussion of the universal service issues raised by the USTA petition.

these competing considerations before adopting any access charge reform measures.

C. Support Balanced Competition in Access Markets

Once again USTA repeats the tired argument that all competitors must be treated equally for customers to benefit from competition. Petition at 16. The notion that an incumbent LEC that serves 99% of the special access market, 100% of the switched access market and 100% of the local exchange market should be treated the same as a CAP serving 1% of the special access market is ludicrous and should not be accepted by the Commission as the basis for policymaking. The "level playing field" argument has been disproved time and again by the benefits derived from gauging regulation of interexchange carriers to their ability to harm competition.^{2/}

USTA attempts to bolster its position by stating that new entrants in the access market have comparable financial resources to LECs, and thus do not warrant more favorable treatment. Petition at 16-17. While it is true that there exist a small number of IXC's with substantial financial resources, the argument that CAPs and LECs are similarly situated is patently ridiculous.^{3/} The goal of

^{2/} For example, AT&T's residential services are still subject to more stringent regulation than its competitors, despite the tremendous growth of those competitors. See Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5908.

^{3/} One need only read a magazine cover or the headlines of a newspaper to observe
(continued...)

balanced competition can only be pursued after meaningful competition exists in communications markets. Any attempt to institute a level playing field before that time will only operate to destroy nascent competition.

D. Promote Efficient Use of the Network

USTA states that the Commission must promote efficient use of LEC networks by eliminating the incorrect price signals sent by current access rates. Petition at 17. As proposed by USTA, efficient use of the network is a goal that is antithetical to the development of a competitive market. The Commission has correctly decided that it must adopt policies that result in the most efficient allocation of all telecommunications resources, not just LEC resources, and that this goal is best achieved by creating competitive markets.^{4/} The Commission must reject USTA's self-serving proposal to implement unnecessary incentives to use LEC facilities.

The efficiency objective, as outlined by USTA, assumes that an increase in traffic results in increased efficiency of the network. Interstate access

^{3/} (...continued)

that the financial resources of the Bell Operating Companies are unrivaled in the communications industry. See, e.g., WOW! Behind the \$12 Billion Bell Atlantic-TCI Merger, cover of Business Week, October 25, 1993.

^{4/} See Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7380 (1992) ("Expanded interconnection will increase the choices available to access customers who value redundancy and route diversity. Network outages have increased awareness that even partial alternatives to the LEC networks may be valuable.").

traffic, however, represents only one portion of the traffic that LEC facilities handle and increased traffic generates increased costs. Accordingly, policies that provide needless encouragement for access customers to use LEC facilities will have only marginal effects on the efficiency of a LEC's network, but they will have a significant negative impact on potential access competitors.

E. Encourage Continued Development of an Advanced National Infrastructure

USTA states that the Commission must adopt policies that encourage productive investments in telecommunications infrastructure. Petition at 18. The Petition fails to demonstrate, however, how the current access rules hinder the ability of LECs to invest in the nation's infrastructure. Indeed, Hyperion submits that there is no nexus between the Commission's regulation of access charges and the ability of a LEC to invest in infrastructure. Accordingly, the Commission should not make continued LEC infrastructure investment a priority in adopting new access charge rules.

F. Prevent Unreasonable Discrimination

While preventing unreasonable discrimination is a worthy objective, and one that Hyperion fully supports, what USTA really seeks is the flexibility to charge discriminatory rates in any market where there is the potential for competition. Petition at 19. USTA's recommendation that the Commission allow price differentiation in competitive markets is deceiving because it implies that

the Commission has actually determined that meaningful competition exists in certain markets. As Hyperion and other CAPs have previously argued, however, the Commission has never addressed the question of when a market is competitive or whether competitive markets exist.^{5/}

The Commission should not grant a LEC additional pricing flexibility in a market until it determines that meaningful competition exists. This cannot be done until the Commission conducts a thorough analysis of the interstate access market and develops some test for measuring competitive conditions. Until such time, any change in access pricing and rate structure will be misguided.

G. Minimize Regulatory Burdens

USTA argues that the Commission must adopt a plan that relieves the Commission from the heavy burden of monitoring LEC access offerings. Petition at 20. This argument is flawed, however, because USTA ignores the fundamental fact that LECs are the only competitors in the access market with the ability to cross-subsidize with revenues from monopoly services. While streamlined regulation is appropriate for carriers that have no ability to cross-subsidize, the Commission cannot pursue the goal of regulatory efficiency at the

^{5/} See Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141 (Transport Phase I) FCC 93-379 (rel. Sept. 2, 1993) ("Switched Transport Order"), Petition for Reconsideration of Hyperion Telecommunications, Inc. ("Hyperion Petition"), filed October 18, 1993.

expense of its duty to protect captive ratepayers. The Commission is not free to abandon its statutory responsibilities because they are burdensome.

III. USTA's REFORM PROPOSALS PROVIDE LECs WITH EXCESSIVE FLEXIBILITY AND HINDER THE DEVELOPMENT OF ACCESS COMPETITION

To achieve the seven objectives discussed above, USTA has proposed specific rate structure and pricing reform measures. These measures are designed to further entrench incumbent LEC monopolies while hindering the ability of CAPs and other LEC competitors to provide meaningful competitive alternatives in the access market. Because USTA's proposals are inconsistent with the Commission's pro-competitive policies, they must be rejected.

A. Access Rate Structure

Under the current access charge framework, USTA claims that LECs have two major problems introducing new access services. First, new rate elements are difficult to categorize within the present rate structure because they often contain elements of both switched and special access. Second, the present access framework requires a LEC to obtain a waiver or rule change before it can introduce a new rate element. Thus, it is not only that the current rate structure is dated to which USTA objects, it is the additional level of Commission oversight.

USTA proposes that the Commission grant LECs flexibility in their structuring of access rates by creating four access categories or pricing baskets: Switching, Transport, Public Policy and Other. Petition at 21. LECs would be

free to introduce new rate elements within these categories without obtaining a waiver from the Commission. Petition at 22-23. USTA argues that this rate structure is beneficial because it allows LECs greater flexibility to respond to customer demands.

While it may be necessary to reform the access rate structure to better accommodate services that have elements of both switched and special access, Hyperion submits that the Commission cannot institute such reforms without, at a minimum, maintaining the current degree of oversight of LEC offerings. Indeed, the emergence of competitive alternatives suggests the need for heightened scrutiny of LEC pricing and conduct. Prior to the onset of competition, the main focus of the Commission's rules was customer exploitation. For the Commission to protect ratepayers in a competitive environment, however, its policies must also be guided by a concern for the continued development of competition.

The need for continued monitoring of LEC access offerings is demonstrated by NYNEX's request for a waiver to offer the Vermont Market Plan,^{6/} a switched access discount plan. Hyperion and others have raised questions as to whether the Vermont Plan will have a negative impact on the

6/ See NYNEX Telephone Companies Petition for Waiver of Part 69 of the Commission's Rules to Offer the Vermont Market Plan, filed August , 1993 ("NYNEX Vermont Petition").

ability of NYNEX to support universal service in Vermont.^{7/} Given the recent request of the Vermont Department of Public Service and the Vermont Public Service Board for additional universal service support to be given to New England Telephone in Vermont,^{8/} the proposed discount plan obviously requires thorough investigation by the Commission. Under the USTA proposal, however, NYNEX would not be required to obtain a waiver before implementing the Vermont Plan and the Commission may not have the opportunity for the thorough review that is required of such proposals.

B. Access Pricing

The access pricing reform proposed by USTA is similar to the density zone pricing scheme already introduced by the Commission. Under the USTA proposal, the level of oversight of LEC access pricing would depend on the number and scope of available alternatives. If customers in a market area had one alternative provider available, the LEC would be allowed additional pricing flexibility within the price cap structure and the ability to respond to a customer's request for proposal with a customized contract.^{9/} Petition at 32. After

7/ See NYNEX Vermont Petition, Opposition of Hyperion Telecommunications at 11; Opposition of the Association of Local Telecommunications Services at 8.

8/ See Waiver of Section 36.631 of the Commission's Rules Governing the Universal Service Fund, Petition for Waiver of the Vermont Department of Public Service and the Vermont Public Service Board, filed Sept. 21, 1993.

9/ USTA refers to these areas as Transitional Market Areas ("TMAs"). An area qualifies as a TMA if "substitutable services from another source" are available. Petition at 25.

additional competitive criteria are met, rates for the LEC's access services in that area would no longer be subject to the Commission's access charge rules.^{10/}

Petition at 32.

Hyperion believes that unchecked rate deaveraging should not be authorized prematurely because it can harm competition and customers. Moreover, the Commission's price cap rules, in conjunction with the special access expanded interconnection rules, give LECs more than sufficient flexibility to attract and retain access business. The Commission should not grant LECs additional pricing flexibility without first finding that meaningful competition exists in a market.

Under the USTA proposal, the presence of a single alternative provider, no matter how small, would provide a LEC with the ability to offer customized contracts in response to customer requests. Because most access traffic is generated by a few large customers, the ability to offer customized contracts, even within the price cap regime, is sufficient to prevent a CAP from gaining significant market share. Because of their ubiquitous networks, LECs

^{10/} USTA refers to these areas as Competitive Market Areas ("CMAs"). A market would qualify as a CMA if customers representing 25% of the demand for a LEC's interstate access services (1) have an alternative source of supply available; and (2) actively seek to reduce the cost of their access services through solicitation of bids, use of private networks or construction of their own facilities. Petition at 26. Alternatively, the first criterion can be met if customers representing 20% of the demand for all interstate access services in an area have an alternative source of supply available. The second criterion also can be met if a single customer representing 15% of the demand for the LECs interstate access services actively seeks to reduce its access costs.

have the ability to offer access customers long term discounts (based on capacity commitments) without requiring the customer to commit traffic to particular facilities or locations.^{11/} Because no CAP network covers the broad geographic scope of a LEC, CAPs are forced to compete by offering discounted rates without requiring term or volume commitments. The flexibility proposed by USTA for areas that qualify as TMAs would force CAPs to cut rates even further to remain competitive, thus jeopardizing the financial viability of many carriers.

USTA's threshold requirements for complete deregulation of an access service also are flawed. Under the USTA proposal, the presence of a single large IXC could qualify an area as a CMA. This would lead to complete deregulation before a single competitive access provider enters the market. As noted in the petitions requesting the Commission to reconsider the Switched Transport Order, such a regulatory regime could result in a less competitive interexchange market and a non-competitive access market.^{12/} Accordingly, the

11/ These LEC "portability" offerings are made possible by tariff provisions (applicable throughout a LATA or state) that waive termination liability and other non-recurring charges usually associated with a reconfiguration of facilities. In its Petition for Reconsideration of the Switched Transport Order, Hyperion suggested that LEC portability offerings should be limited to "competitive zones" once density zone pricing is implemented. Hyperion Petition at 8-9. Should the Commission adopt access charge rules based on the zone structure proposed by USTA, a similar restriction on portability offerings is warranted.

12/ See, e.g., Petition for Reconsideration of the Competitive Telecommunications Association at 4-5, filed Oct. 15, 1993.

access pricing reforms proposed by USTA are inconsistent with the Commission's pro-competitive policies and must be rejected.

IV. THE COMMISSION CANNOT ADOPT CHANGES IN ACCESS RATE STRUCTURE AND PRICING WITHOUT DETERMINING THE PROPER LEVEL OF ASSISTANCE FOR PUBLIC POLICY GOALS

Hyperion thoroughly supports the goal of universal service.

However, Hyperion believes an investigation of the Commission's contribution and assistance policies is necessary to determine the extent of any current subsidy flowing from access services and whether such subsidies are properly distributed to those in need of assistance.

Universal service has traditionally been achieved through policies that encourage reasonable rates for all residential customers. Under such an approach, millions of residential customers who have no need for a subsidy receive one nonetheless. This subsidy distorts the signaling effect that prices are supposed to have and leads to an inefficient allocation of the nation's telecommunications resources. Hyperion believes that access charges should only include contributions for identified public policy needs that have been demonstrated to exist. Should CAPs and IXC's be required to contribute to such needs, all carriers (including LECs) should be required to contribute in proportion to the amount of overall traffic they represent on a LEC's network.

Collecting and distributing revenues for public policy goals should be handled by a non-LEC third party. Hyperion has previously suggested creation

of an "escrow account" into which all carriers would contribute.^{13/} The third party that monitors the account would distribute funds to those LECs able to demonstrate costs incurred in achieving universal service goals. The escrow account approach has the benefit of determining the precise scope of current contribution and assistance flows, while preventing LECs from using universal service funds to mask inefficiencies in their provision of service.

V. CONCLUSION

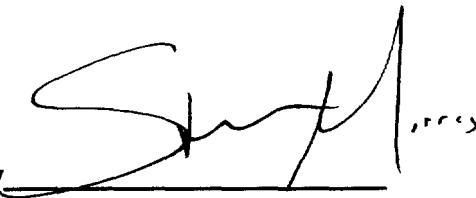
Hyperion believes adoption of the access reform measures proposed in the USTA petition would be premature at this time. The Commission must first institute proceedings to determine the present level of competition for access services and to adopt a test for when a market is deemed to be competitive. The Commission must also reconsider its current assistance and contribution policies

^{13/} Hyperion Petition at 10-11. Hyperion proposed the escrow account as a way to monitor the Residual Interconnection Charge that LEC competitors must pay under the Commission's expanded interconnection decisions. The funds collected through the RIC should be applied to the public policy goals outlined above.

and adopt policies that ensure that funds are only received by those in need of assistance.

Respectfully submitted,

HYPERION
TELECOMMUNICATIONS, INC.

By 
Leonard J. Kennedy
Steven F. Morris

Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

November 1, 1993

CERTIFICATE OF SERVICE

I, Roberta L. Fidele, hereby certify that today on this 1st day of November, 1993, I caused a copy of the OPPOSITION OF HYPERION TELECOMMUNICATIONS to be served by first class mail, postage prepaid to the following:

Martin T McCue
Vice President & General Counsel

Linda Kent
Associate General Counsel
United States Telephone Association
900 19th Street, N.W., Suite 800
Washington, D.C. 20006-2105


Roberta L. Fidele